IN THE

Supreme Court of the United States

OCTOBER TERM 1966

Office-Supreme Court, U.S.
FILED
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No. 333

MAMIYE BROS., *et al.*,
against *Petitioners,*
BARBER STEAMSHIP LINES, INC., *et al.*,
against *Respondents,*
ATLANTIC STEVEDORING CO. INC., *et ano.*,
Respondents.

GELMART KNITTING MILLS, INC., *et al.*,
against *Petitioners,*
BARBER STEAMSHIP LINES, INC., *et al.*,
against *Respondents.*
ATLANTIC STEVEDORING CO. INC., *et ano.*,
Respondents.

ISAAC COHEN & SONS CORP., *et al.*,
against *Petitioners,*
BARBER STEAMSHIP LINES, INC., *et al.*,
against *Resppndents,*
ATLANTIC STEVEDORING CO. INC., *et ano.*,
Respondents.

BRIEF FOR RESPONDENTS ATLANTIC STEVEDORING CO., INC. AND ATLANTIC PIERS CO., INC. IN OPPOSITION TO PETITION FOR CERTIORARI

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INDEX

	PAGE
Statement	1
Law	2
Facts	3
Argument	5
Conclusion	6

CITATIONS

Cases:

Magnum Co. v. *Coty*, 262 U. S. 159 (1923) 6

Mamiye Bros. v. *Barber Steamship Lines, Inc.*, 241 F. Supp. 99, aff'd 360 F. 2d 774 (2nd Cir. 1966) 2, 4, 5

World Products Inc. v. *Central Freight Service*, 222 F. Supp. 849, aff'd 342 F. 2d 290 (3rd Cir. 1965) 2, 3, 4, 5

Statutes:

46 U.S.C. 1300-1315 (Carriage of Goods by Sea Act, 1936) 2

46 U.S.C. 190-196 (Harter Act of 1893) 2

New Jersey Statutes Annotated 57:1-24 (Uniform Warehouse Receipts Act) 2

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BRIEF FOR RESPONDENTS IN OPPOSITION

Statement

Petitioners, after exhaustive fact findings adverse to their position by both the United States District Court for the Southern District of New York and the United

States Court of Appeals for the Second Circuit, now petition this Court for certiorari. The Petitioners' contention of a conflict between the Courts of Appeal of the Second and Third Circuits is without legal foundation. Factually, the cases were in accord on common principles of law, differing only in the result because of the distinguishable law and findings of fact. Thus, in reality, the Petitioners approach this Court for a further review of the facts.

A simple analysis of the two cases, i.e., the consolidated case at bar, *Mamiye Bros.* v. *Barber Steamship Lines, Inc.*, 241 F. Supp. 99, aff'd 360 F. 2d 774 (2d Cir. 1966) and *World Products Inc.* v. *Central Freight Service*, 222 F. Supp. 849, aff'd 342 F. 2d 290 (3rd Cir. 1965), readily demonstrates that there is no basis upon which Petitioners can, in fact, assert any conflict which should prompt this Court to consider the review of this case.

Law

World Products Inc. v. *Central Freight Service, supra,* was a civil diversity suit interpreting New Jersey's substantive law embodied in the Uniform Warehouse Receipts Act, N.J.S.A. 57:1-24. The consolidated case at bar, *Mamiye Bros.* v. *Barber Steamship Lines, Inc., supra,* was a suit in admiralty interpreting Federal Statutory Law embodied in the Carriage of Goods by Sea Act of 1936, 46 U.S.C. 1300-1315 and the Harter Act of 1893, 46 U.S.C. 190-196.

The *World Products* case and the case at bar both involved damage to property during the passage of Hurricane Donna on September 12, 1960 and in both cases the Circuit Courts of Appeal found the hurricane to be an Act of God.

The two Courts agreed upon the common principle of law involved. The correct proposition was clearly stated by the trial court in *World Products, supra* (page 851):

> "Although Hurricane Donna constituted an Act of God, the question still remains whether the storm was the sole cause of the damage to the plaintiff's goods."

The Court placed the burden on the defendant-bailee and found on the facts listed below that there was concurrent negligence.

In the case at bar, District Judge Wyatt* opined along the same line, "It would seem therefore to follow that the Act of God exception by definition cannot be established unless and until the carrier or bailee shows that the loss could not have been prevented by reasonable care and foresight." (18 App.)** The Court placed the burden on the respondent and found on the facts that there was no concurrent negligence.

Facts

The two Circuit Courts of Appeal affirmed the different conclusions as to liability reached by the District Judges essentially because of the different facts developed at the trials by the different attorneys. A brief comparison of the basic and crucial findings of fact make this apparent.

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* A copy of the District Judge's opinion is attached for the Court's convenience.

** Figures followed by "App." refer to pages of appendix to this brief.

In World Products	*In the Case at Bar*
222 F. Supp. at page 852	
"• • • that defendant took no precautions to protect the goods in the warehouse from flood damage either before or after it learned of the approaching hurricane • • •"	"On Monday morning, September 12, the labor ordered for that day showed up at 8 a. m. DST. There were 7 "gangs" of 23 men (including supervisor and 2 machine operators) and 70 "extra labor" or a total of 231 men. When they reported there were already high winds and heavy rain. The two ships refused to open hatches because of the rain. Some labor was receiving and delivering cargo. All other labor was put to work either placing extra pallets under the cargo tiers (to raise them higher) or nailing up doors which began to blow in during the morning." (34 App.)
"• • • that the use of additional dunnage by the defendant would have mitigated or avoided the loss, but was not attempted."	"Through these efforts, extra pallets were placed under about 3% to 5% of the cargo on the pier." (34 App.)
"• • • that defendant received adequate warning, a day or two before, that a hurricane was moving up the Atlantic Coast • • •"	"Until 10:00 P.M. DST on Sunday, September 11, there was no warning from the Weather Bureau that Donna might reach New York Harbor." (38 App.)

In World Products	*In the Case at Bar*
"* * * that as much as 70% of the first floor of the Edgewater warehouse was, at normal high tide, three to four feet above the water of the Hudson River * * *"	"The floor of the pier is 10 feet above mean low water. The City of New York requirement for piers in this respect is that they be 9 feet above mean low water." (32 App.)
"Upon considering all the evidence presented in this case, the Court finds as a fact that defendant was negligent * * *"	"The evidence establishes that the water damage from Hurricane Donna could not have been 'guarded against by the ordinary exertions of human skill and prudence.'" (36 App.)

ARGUMENT

The Petition for a Writ of Certiorari Should Be Denied for the Following Reasons

Although Petitioners have advanced a variety of arguments, all are premised on an illusory conflict between the Second and Third Circuit Courts of Appeal. The same arguments, based on the *World Products* case, were pressed in the District Court and the Court of Appeals and in both instances the illusion of conflict was destroyed by the decisions distinguishing the facts.

The Petitioners offer no substantial reason for the granting of a writ. They have not shown any conflict of opinion and what they really seek is a further third examination of the facts by this Court. Such a scrutiny of the records here involved has not been traditionally the function or the duty of this Court. Needless to say such a scrutiny would certainly be unrewarding.

The Petitioners have failed abjectly to articulate how any issue in this case is of such importance as to warrant

review by this Court. Where Petitioners argue about a disputed question of fact as we have here, the case falls within the rule enunciated in *Magnum Co.* v. *Coty,* 262 U. S. 159 (1923) where this Court held, at page 163:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

CONCLUSION

In view of the foregoing, it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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